

APR 15 1983

ALEXANDER C. STEVAS,
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IN THE

Supreme Court of the United States
OCTOBER TERM 1982

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,
vs.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents.

**BRIEF OF AMICUS CURIAE PUBLIC COMMISSION
OF THE DISTRICT OF COLUMBIA IN SUPPORT OF
PETITIONS FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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QUESTIONS PRESENTED¹

1. Where the rate regulation of certain offerings of communications common carriers has historically been the exclusive prerogative of the states, with a federal regulatory agency created by Congress to exercise regulatory power in those areas that cannot be reached by state regulatory agencies, may the federal agency adopt a new policy of "non-regulation" of these offerings, and while declining to exercise its own jurisdiction, issue preemption orders that preclude the states from exercising their regulatory powers?
2. Whether the Court below erred in holding that the Federal Communications Commission's preemption of State regulatory authority to tariff customer premises telephone equipment is a legitimate exercise of the Commission's jurisdiction under the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1976).

¹The first question presented is that presented by the petitioner in No. 82-1331. The second question presented is that presented by the petitioners in No. 82-1352. While the two questions overlap, the Public Service Commission of the District of Columbia urges the court to grant both petitions, encompassing both questions, so it is able to consider all aspects of the preemption issue.

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Public Service Commission of the District of Columbia ("the D.C. Commission") respectfully suggests that the court should issue a writ of certiorari to review that part of the decision of the United States Court of Appeals for the District of Columbia Circuit which sustains the authority of the Federal Communications Commission to ban state regulatory commissions from regulating customer premise equipment ("CPE").

The D.C. Commission, like other state and local public utility regulatory agencies, has the authority and responsibility for the regulation of public utilities doing business in the District of Columbia.² The essential function and purpose of the D.C. Commission is

. . . To insure that every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished . . . shall be reasonable, just and non-discriminatory.³

Among the utilities subject to regulation by the D.C. Commission is The Chesapeake & Potomac Telephone Company, a subsidiary of American Telephone & Telegraph Co., which offers local telephone service in the District of Columbia. The D.C. Commission's primary regulatory responsibilities for telephone and telegraph companies are set out in D.C. Code §§ 43-501 - 43-623 and 43-1401 *et seq* and include the regulation and tariffing of public utility services. See *The Chesapeake & Potomac Tel. Co. v. Public Service Commission*, 378 A.2d 1085 (D.C. App. 1977); *Classified Directory Subscribers Ass'n v. Public Service Commission*, 383 F.2d 510 (D.C. Cir. 1967).

This case and the related case of *United States v. American Tel. & Tel. Co., aff'd sub nom. Maryland v. United States*, ____ U.S. ___, 103 S.Ct. 1240 (1983) ("The A.T.&T. Case"⁴) drastically alter the regulatory

²D.C. Code §§ 43-401 *et seq.* (Michie Ed. 1981).

³D.C. Code § 43-402.

⁴The D.C. Commission was an intervenor in the A.T.&T. case.

responsibilities and authority of the D.C. Commission and other state commissions.⁵ The Final Order of the F.C.C. sustained by the court of appeals reduces the D.C. Commission's jurisdiction to regulate a significant segment of heretofore tariffed offerings of the local telephone company. The Commission believes that this forced deregulation will ultimately injure local rate payers, particularly individual, non-commercial telephone users, by requiring increases in basic rates. It is also interested in what it believes to be an unwarranted, improper and sudden usurpation of regulatory authority by the F.C.C. in an area heretofore reserved for state and local regulation.⁶

STATEMENT OF THE CASE

While the F.C.C. orders sustained by the court of appeals address several loosely related subjects, the issues presented by the petitions concern only the F.C.C.'s decision to force state and local commissions to deregulate CPE. The F.C.C.'s reasoning is important for the issues before the court. Having concluded that its *Computer I* rules were unworkable and that the wide variety of CPE

⁵Although created by Act of Congress, the D.C. Commission functions like a state commission, regulating local telephone service.

⁶The F.C.C. did not initially give notice of its intent to consider broad preemption of state and local authority to tariff CPE until its Final Decision. *Second Computer Inquiry*, 77 F.C.C. 2d 384 (1980). The D.C. Commission was not a party before the F.C.C. and did not initially seek to intervene on appeal. After the district court modified the decree in the A.T.&T. case, the great changes being made in State and local regulatory jurisdiction of telephone service became apparent to the D.C. Commission and it sought to intervene in the court of appeals in this case. By that time, the court of appeals had already heard argument, and it denied the D.C. Commission's motion to intervene.

available made a classification scheme for carrier — provided CPE unwise, the F.C.C. decided that carrier — provided CPE was not a common carrier service subject to Title II (tariff) regulation. 77 F.C.C.2d at 438-439. The F.C.C. then concluded that the offering of CPE in conjunction with regulated carrier services ("bundling") directly affects rates for interstate services when such equipment is subject to the separations process. 77 F.C.C.2d at 446. The F.C.C. then announced that carrier — provided CPE would be unbundled, that is, charged separately from the bill for other carrier services and, once unbundled, could only be provided for on a detariffed, that is, deregulated, basis. This deregulation affects not only the F.C.C. but also state and local commissions, because, in order to achieve detariffing of CPE, the F.C.C. order prohibits state and local commissions from tariffing CPE. 77 F.C.C.2d at 445-455.

Only a portion of the court of appeals' opinion addresses the issue of whether the F.C.C. is authorized to preempt state and local regulation of CPE by an order which forbids state and local commissions from tariffing CPE.⁷ See A28 - A42. The court of appeals correctly points out that, having concluded that it could not impose price regulation of carrier — provided CPE pursuant to Title II, the F.C.C.'s regulatory jurisdiction was ancillary.⁸ A-29 - A-32. The court of appeals' reasoning in sustaining F.C.C. preemption is essentially that CPE has both intrastate (local) and interstate use and that nothing

⁷References are to the reprint of the court of appeals' opinion appended to the petition in No. 82-1331.

⁸The F.C.C. has long been recognized to have the power to regulate some communications — related entities not included in the Federal Communications Act on the theory that the regulation is a necessary adjunct to its exercise of its statutory regulatory duties. See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

in the Federal Communications Acts provisions reserving State regulatory authority⁹ prevents the F.C.C. from asserting full jurisdiction over dual use CPE. A-34 -A-42.

SUMMARY OF ARGUMENT

The F.C.C. action which the court of appeals approved marks a striking departure from prior practice. In the past, recognizing that CPE has both interstate and intrastate aspects, the F.C.C. has agreed that the states bear primary responsibility for regulating CPE. The few exceptions have been in regard to issues particularly affecting interstate matters.

The F.C.C.'s choice of mode of preemption in this case — creation of a regulatory vacuum — is a method which this court has largely disfavored. In the one instance in which this court approved it, Congress quickly overruled the decision.

A factor strongly weighing in favor of granting the writ is the importance of this case. The F.C.C. rules approved, together with the recent changes mandated by approval of the A.T.&T. decree modification, sharply restrict the role of the states in telephone regulation. This case is too important — both in terms of the preemption precedent and of the effect it will have on telephone service in the entire country — to be finally decided with only the cursory attention of the two judges who decided it in the court of appeals.

⁹47 U.S.C. §§ 152(b)(1) and 221(b).

ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

1. The Traditions of Federal and State Regulation

By its decision in this case the F.C.C. has overturned and abrogated a clear, settled and well-understood practice of non-interference by the F.C.C. or its predecessors in rate regulation of CPE by state and local regulatory authorities. That practice of according the states great latitude in setting rates extended as far back as 1910, when the Congress first enacted regulatory legislation in the telephone field,¹⁰ and continued through 1934 with the adoption of the Federal Communications Act¹¹ and then on until May 2, 1980 when the Commission released the Order in question, reported at 77 F.C.C.2d 384 (1980).

The few, sporadic cases relied upon by the F.C.C. to support the unprecedented usurpation of power in this proceeding in fact show, if anything, a sensitivity to the role of the states in regulating CPE, and do not, therefore, provide a basis for the extraordinary action taken by the F.C.C. here. None of these cases involves a situation where state regulation was pitted against federal regulation of CPE. The F.C.C. in those cases asserted regulatory jurisdiction — if at all — not to throttle or thwart state regulation of CPE but rather to force A.T.&T. and other telephone companies to permit attachment of non-carrier provided CPE to the telephone system ("foreign attachments") or to regulate CPE in those special and unusual cases where the CPE was, as found by the F.C.C. as a matter of fact, to be exclusively or predominantly

¹⁰Act of June 18, 1910 ("the Mann - Elkins Act") ch. 309, § 7, 36 Stat. 544 (1910).

¹¹47 U.S.C. §§ 151 *et seq* (1976).

used in interstate communications. A brief review of these cases shows conclusively that they cannot support the F.C.C. decision below.

In *Use of Recording Devices*, 11 F.C.C. 1033 (1947) a "foreign attachments" case, the F.C.C. asserted jurisdiction regarding the use of recording devices in connection with interstate and foreign message toll telephone service. While rejecting the contention that the states had exclusive regulatory jurisdiction over the matter, the F.C.C. noted that by the use of on-and off-switches, subscribers could easily limit the use of recording devices to interstate and foreign calls.

Accordingly, State and other local and regulatory authorities remain entirely free to deal as they see fit with the use of recording devices on intrastate calls. Whether . . . a user with a recording device will employ it on intrastate, as well as interstate and foreign calls, obviously depends on the position taken in the matter by the appropriate local authorities.

(11 F.C.C. at 1047).

In *Jordaphone Corp of America v. A.T.&T.*, 18 F.C.C. 644 (1954), another "foreign attachments" case, this time involving automatic telephone answering devices, the F.C.C. asserted jurisdiction but declined to regulate. The Commission clearly recognized a "joint jurisdiction" with the states (18 F.C.C. at 670), and held that it would not regulate "unless the record reveals a very clear need for such action." (*Id.*) The F.C.C. noted that with rare exceptions these devices would be used to answer intrastate and local exchange calls more often than they would be used to answer interstate and foreign toll calls and, therefore, the F.C.C. properly left it to state and local authorities to

decide whether to allow the use of these devices. (18 F.C.C. at 671).

Three years later in *Hush-A-Phone Corp v. A.T.&T.*, 22 F.C.C. 112 (1957), yet another 'foreign attachment' case involving devices to, *inter alia*, screen out extraneous ambient noises, the F.C.C., following the mandate in *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956), ordered A.T.&T. to file tariffs so as to allow the use of any device which does not injure A.T.&T.'s employees, facilities, the public use of A.T.&T.'s services, or impair the operation of the telephone system. Nothing in the order directed that the states follow or not follow a particular regulatory approach.

In *Doniphan Tel. Co. v. A.T.&T.*, 34 F.C.C. 949 (1963) the F.C.C. recognized that all CPE can at one time or another be used in interstate commerce. However, it went on to say that Congress had worded the 1934 Act "to reserve for State regulatory authorities jurisdiction over that part of the telephone industry which relates to exchange and intrastate telephone activities" (34 F.C.C. at 967). Accordingly, the Commission refused to mediate a dispute between the local telephone company and A.T.&T. regarding interconnections between the two systems.¹²

¹²In *A.T.&T.-Railroad Interconnection*, 32 F.C.C. 337 (1962) the F.C.C. did assert jurisdiction over exchange facilities to the extent that such were used in interstate toll communications. One observes that the railroads themselves were engaged rather directly in interstate commerce and that their communications over their specialized telephone systems would be, to a considerable degree, interstate in character. Nothing in this case, therefore, cuts off or preempts appropriate state regulation and nothing in the order implies such a result.

A concern for the proper balance of state and federal regulation continued in *A.T.&T. — T.W.X.*, 38 F.C.C. 1127 (1965) where the F.C.C. asserted jurisdiction over the charges made by A.T.&T. for typewriter exchange service ("T.W.X."). The F.C.C. found that T.W.X. service was "predominantly interstate in its use." (38 F.C.C. at 1133)

In *General Telephone Company*, 13 F.C.C.2d 448 (1968) the F.C.C. held that channel (i.e. private line) service offerings by telephone companies to cable television ("CATV") systems constituted interstate common carriage and that the lines were "interstate" within the meaning of § 214 of the 1934¹³ Act. Here, too, the predominant use -- CATV transmission -- was interstate as this Court in effect ruled in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).¹⁴

In *United States Department of Defense v. General Telephone Company*, 38 F.C.C.2d 803 (1973), *review den. F.C.C. 73-844, aff'd per curiam sub nom. St. Joseph Telephone & Telegraph Co. v. F.C.C.*, 505 F.2d 476 (D.C. Cir. 1974), the F.C.C. asserted jurisdiction to regulate the charge for dial restoration panel ("DRP") equipment, a species of CPE. The F.C.C. found, as in *A.T.&T. — T.W.X.*, *supra*, and *General Telephone Company, supra*, that the predominant use of this CPE was interstate. DRP was a portion of the Air Force's nationwide air defense

¹³74 U.S.C. § 14.

¹⁴In its Order on Reconsideration, 14 F.C.C. 2d 695 (1968) the F.C.C. was careful to note that CATV service was essentially separate and apart from other telephone service and facilities and that regulation of CATV service would not impinge upon state regulation of such other service and facilities. 14 F.C.C.2d at 697. The F.C.C.'s actions there were upheld in *General Telephone Co. v. F.C.C.*, 413 F.2d 390 (D.C. Cir. 1969), *cert. den.* 396 U.S. 888 (1970).

system and was primarily designed for interstate use, and communications over the system were primarily related to this interstate, national defense purpose. (38 F.C.C.2d at 813) The special facts relating to DRP clearly controlled the outcome of the case and the proper balance between state and federal regulation of CPE is left undisturbed by the decision.¹⁵

2. The Regulatory Vacuum

The F.C.C. action which the court of appeals sanctioned took an unusual form. First, the F.C.C., in the name of administrative convenience and policy (fostering competition) decided that it should not regulate CPE. Then, in the name of the same policy, it decided that state and local commissions could not regulate CPE either. As a result, it created a regulatory vacuum.

The D.C. Commission has discovered only one instance in which this court has sustained the authority of a federal

¹⁵Reliance on the F.C.C.'s more recent decisions on foreign attachments — *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787 (4th Cir. 1976), *cert. den.* 97 S.Ct. 651 (1976), and *Interstate and Foreign Message Toll Telephone*, First Report & Order in Docket No. 19258, 56 F.C.C.2d 593 (1975), *on reconsideration*, 57 F.C.C.2d 1216 (1976), 58 F.C.C.2d 716 (1976) and 59 F.C.C.2d 83 (1976) and Second Report & Order in Docket No. 19258, 58 F.C.C.2d 736, *on reconsideration*, *aff'd sub nom. North Carolina Utilities Commission v. F.C.C.*, 552 F.2d 1036 (4th Cir. 1977), *cert. den.* 98 S.Ct. 222 (1977) — is misplaced. *Amicus curiae* agrees with the appellants that those decisions do not preempt state rate regulation of CPE. Indeed the Fourth Circuit took great pains to point out that they do not do so. See, e.g., 537 F.2d at 793 n. 6; 552 F.2d at 1048.

agency to preempt state regulation by creation of a regulatory vacuum. See *Guss v. Utah Labor Board*, 353 U.S. 1 (1956). As Mr. Justice White pointed out in *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 155 (1971) (dissenting opinion), "Congress' swift overruling of the Court's decision in *Guss*... should make the court approach with great caution the creation of another 'vast-no-man's land, subject to regulation by no agency or court.'" Although the issue has not come up often, this court's earlier statements on the subject read strongly against the creation of regulatory vacuums by implication of Congressional intent. See, e.g., *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972); *F.P.C. v. Transcontinental Gas Corp.*, 365 U.S. 1, 19 (1962); *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939). The only case in this court touching on the subject of regulatory vacuum in the telephone field is *Northwestern Bell Telephone Co. v. Nebraska State Railway Commission*, 297 U.S. 471 (1936). The federal statute authorized the I.C.C. to establish depreciation rates for telephone plant, and the utility contended that, even though the I.C.C. had not adopted regulations, the passage of the statute preempted state adoption of depreciation rates for utility plant. The court rejected the preemption argument, holding that the states would be preempted only if the I.C.C. actually adopted regulations on the subject.

While none of the cases just cited are identical to this one, they point up the fact that the device chosen by the F.C.C. to preempt state regulation — the creation of a regulatory vacuum — is one which this court has generally rejected.

Expression in circuits other than the District of Columbia Circuit likewise weighs against sanctioning regulatory

vacuums. The most thorough consideration of the subject is the Second Circuit's decision in *New York Telephone Co. v. F.C.C.*, 631 F.2d 1059 (2d Cir. 1980). There, the New York Commission had asserted jurisdiction over interstate foreign exchange and common control switching arrangements services, a species of private line services, based on the connection to local telephone exchanges. The F.C.C. issued a preemption order. New York telephone argued that the F.C.C. could not preempt state regulation without adopting its own tariff on the subject, "[t]hat is to say, the agency may not "preempt state regulations without itself occupying the field by effective regulations." 631 F.2d at 1066. The Second Circuit agreed with the foregoing proposition, *id.*¹⁶ but, in examining the F.C.C.'s ruling, read it to mean that the F.C.C. had provided effective tariff regulation of the service by authorizing the company to apply to the F.C.C. for approval of the company's proposed charge. 631 F.2d at 1067.

The regulatory vacuum issue was discussed extensively at oral argument of this case. The questions of Judge Edwards,¹⁷ in particular, pointed up that the F.C.C. was asking the court to accept an unusual form of preemption, particularly when its basis for asserting even joint regulatory jurisdiction was not Title II but ancillary.

¹⁶In addition to examining this court's decisions, which are discussed above, the Second Circuit opinion examines the court of appeals cases on preemption of state highway safety regulation by the federal Department of Transportation which hold that a state is not preempted from adopting safety regulations on a subject unless there is an adopted federal regulation. See *Chrysler Corp. v. Tofany*, 419 F.2d 499 (2d Cir. 1969); *Chrysler Corp. v. Rhodes*, 416 F.2d 316 (1st Cir. 1969).

¹⁷Circuit Judge Edwards was part of the division which heard argument, but he did not participate in the decision.

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Despite the court of appeals' full awareness of the regulatory vacuum issue, it is not even considered in the opinion.

3. The Importance of the Decision of the Court of Appeals

This is an extremely important case; together with the A.T.&T. case,¹⁸ it marks a dramatic reduction in the authority of state regulators to regulate local telephone companies. Unlike the F.C.C.'s decision in the *Computer I* case, in which the Second Circuit subjected the F.C.C.'s rules to close examination and invalidated a portion of them because the F.C.C. had improperly expanded the concept of its ancillary jurisdiction, see *GTE Service Corp. v. F.C.C.*, 474 F.2d 724 (2d Cir. 1973), the decision of the court of appeals in this case defers to the F.C.C. without seriously examining what the F.C.C. has done. Authored by a single court of appeals judge with the concurrence only of a visiting district judge, the court of appeals' decision makes no analysis of the unusual and far reaching nature of the F.C.C.'s decision. The F.C.C., however, fully understands the broad authority which the court of appeals has given it, because it has already used it as a basis for preempting state commission authority in other areas heretofore reserved for state regulation. See, e.g., *In the Matter of Amendment of Part 31*, ____ F.C.C.2d____ (Order No. 82-581 in CC Docket No.

¹⁸The district court approved a decree modification in A.T.&T. which substantially supplanted state commissions' regulatory authority and which removed embedded CPE from the rate base of the local telephone companies subject to state commission jurisdiction. Three members of this court dissented from the affirmance without plenary consideration on the state preemption point. *Maryland v. United States*, ____ U.S. ____, 103 S.Ct. 1240 (Feb. 28, 1983).

79-105 released Jan. 8, 1983), appeal pending sub nom. *Virginia State Corporation Commission v. F.C.C.*, 4th Cir. No. 83-1136 (depreciation rates for equipment owned by local telephone companies); *In the Matter of MTS and WATS Market Structure*, ___ F.C.C.2d___ (Order No. 82-587 in CC Docket No. 78-72, Phase I, Released Feb. 28, 1983), appeal pending, *National Association of Regulatory Utility Commissioners v. F.C.C.*, D.C. Cir. No. 83-1225 and *Public Service Commission of the District of Columbia v. F.C.C.*, D.C. Circ. No. 83-1339 (substituting access charges for joint board separation procedures.)

While the point is properly made that the F.C.C. should not be permitted to take from state commissions regulatory authority which Congress specifically reserved to them when it adopted the Federal Communications Act, see *North Carolina Utilities Commission v. F.C.C.* 537 F.2d 787, 799 (4th Cir. 1976) (dissenting opinion of Judge Widener), this case has other equally important dimensions. The state and local commissions have traditionally assumed the role of serving the "universal telephone service" goal by assuring that basic exchange services, which are used by individual telephone users, are kept at affordable levels. See, e.g., *Re The Chesapeake & Potomac Tel. Co.*, 43 PUR 4th 169 (D.C.P.S.C. 1981). The predictable result of broad F.C.C. preemption and the actions it has taken in the present case and its other recent preemption decisions will be deprive the state and local commissions of the ability to serve the universal service goal by keeping basic exchange rates affordable. The beneficiaries will be the users and offerors of long distance and sophisticated business services. The far reaching changes the F.C.C. is making are based on a very tenuous view of preemption, and this court should examine very

carefully the legitimacy of that view before sanctioning its implementation.

CONCLUSION

These cases clearly merit issuance of the writs of certiorari.

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